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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-624

JOSEPH R. THOMPSON,
Appellant,

v.

COMMONWEALTH, ex rel. JOAN THOMPSON,
Appellee.

On Appeal From the Superior Court of Pennsylvania for the Philadelphia District.

JURISDICTIONAL STATEMENT.

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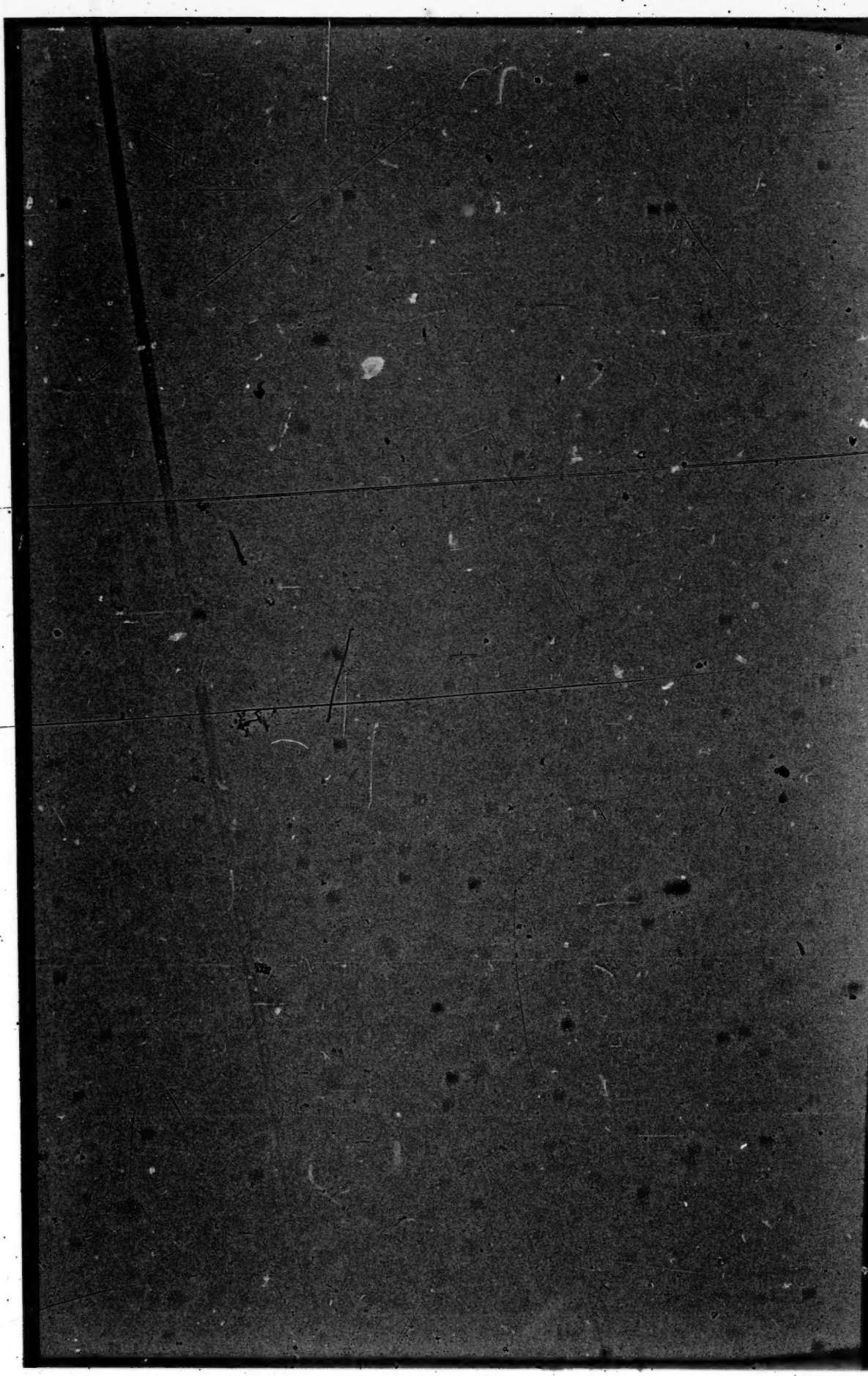

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IN THE

Supreme Court of the United States

No.

JOSEPH R. THOMPSON,

Appellant,

v.

COMMONWEALTH, EX REL. JOAN THOMPSON,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA FOR THE PHILADELPHIA DISTRICT.

JURISDICTIONAL STATEMENT.

Appellant appeals from the final judgment of the Superior Court of Pennsylvania for the Philadelphia District, entered on December 10, 1970, affirming an order of the Court of Common Pleas of Montgomery County, Pennsylvania, Criminal Division. The appellant's Petition for allowance of appeal from the judgment of the Superior Court of Pennsylvania was timely filed with the Supreme Court of Pennsylvania on January 7, 1971, and denied on August 16, 1971. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Montgomery County, Pennsylvania, Criminal Division is reported in 93 Mont. Co. L. R. 81 (1970). The per curiam decision of the Superior Court of Pennsylvania is reported in 217 Pa. Super. 874, 272 A. 2d 189 (1970). The per curiam decision of the Supreme Court of Pennsylvania is not reported. Copies of the opinions and decisions are annexed hereto as appendices A, B, and C respectively.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

1. *The nature of the proceeding.* This is an action under the Penal Code of Pennsylvania, Act of June 24, 1939, P. L. 872, § 733, as amended 1968, July 31, P. L. —, No. 316, § 1, 18 P. S. § 4733, brought against the appellant, Joseph R. Thompson, on the relation of his wife, Joan Thompson, to compel the payment of support for the wife alone.

2. *The judgment or decree sought to be reviewed* was dated and entered on December 10, 1970, by the Superior Court of Pennsylvania, and is embodied in their per curiam decision. No separate judgment or decree was entered. A copy of the final judgment is annexed hereto as appendix B. The Supreme Court of Pennsylvania refused to exercise its discretionary review and on August 16, 1971, entered an order denying the appellant's Petition for allowance of appeal from the judgment of the Superior Court of Pennsylvania, which was timely filed on January 7, 1971. A copy of this order is annexed hereto as appendix C. On September 9, 1971, the notice of appeal to this Court was filed with the clerk of the court possessed of the record, namely, the

clerk of the Court of Common Pleas of Montgomery County, Pennsylvania, Criminal Division. A copy of the notice of appeal is annexed hereto as appendix D.

3. *The statutory provision believed to confer on this Court jurisdiction* of the appeal is 28 U. S. C. § 1257 (2).

4. *Cases believed to sustain the jurisdiction: Boddie v. Connecticut*, 91 S. Ct. 780 (1971); *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 678, n. 1; *Herb v. Pitcairn*, 324 U. S. 117, 128; *Lynumn v. Illinois*, 372 U. S. 528, 535-536; *Whitney v. California*, 274 U. S. 357, 361.

5. *State statute whose validity is involved* is the Act of June 24, 1939, P. L. 872, § 733, as amended 1968, July 31, P. L. —, No. 316, § 1, 18 P. S. § 4733. A copy of this statute, hereafter referred to as "§ 733 of the Penal Code", is annexed hereto as appendix E.

QUESTIONS PRESENTED.

1. Whether §733 of the Penal Code, as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution since it was the basis for the entry of a temporary order denying the appellant's right to be heard in that it was entered before the appellant completed his direct testimony and had the opportunity to introduce the testimony of two important witnesses.

2. Whether the aforesaid statute, as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution since if was the basis for the entry of a temporary order for a period of over seven and one-half months, which so delayed appellant's right of appeal as to effectively deny him this right and his right to procedural due process under the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE.

1. Facts Material to the Consideration of the Question Presented.

Appellant was a defendant in a support action brought on behalf of his wife alone under § 733 of the Penal Code of Pennsylvania in the Court of Common Pleas of Montgomery County, Pennsylvania, Criminal Division. At the time the action was commenced the wife was a New Jersey resident (T. R. 4).

Although the appellant denied any obligation to support his wife on the grounds that she left him without legal cause, the trial court at the initial hearing held on November 6, 1969, entered a temporary order requiring the appellant to make support payments of eighty dollars a week (T. R. 110). At the time this order was entered the appellant had not completed his direct testimony nor did he have an opportunity to complete his defense.

It was not until the next and final hearing held on February 4, 1970 (approximately three months later), that appellant was permitted to complete his direct testimony and introduce the testimony of two important witnesses. At the conclusion of the testimony at this hearing, the court continued in full force and effect the temporary order until oral argument (T. R. 216). Briefs were filed and oral argument was completed on March 6, 1970.

The trial court entered a final appealable order on June 23, 1970, reducing the weekly support payment from eighty dollars to sixty dollars per week. During the seven and one-half month period the temporary order was in effect the appellant was required to pay over two thousand five hundred dollars before he was adjudged and permitted the opportunity to exercise his right of appeal. A copy of the final order is annexed hereto as appendix E.

2. How the Federal Question Sought to Be Reviewed Was Raised.

The Superior Court of Pennsylvania entered an order on September 16, 1971, certifying and making a part of the record the fact that it considered and passed upon the question of whether § 733 of the Penal Code violated the due process clause of the United States Constitution. A copy of this order and initial order affirming the trial court are annexed hereto as appendices G and B respectively.

The question presented on this appeal was first raised by the appellant as a statement of question involved in his brief and argument before the Superior Court of Pennsylvania. Appellant had no other method of presenting the question since there is no provision in the law or practice of Pennsylvania requiring the filing of exceptions or assignments of error upon such an appeal. Moreover, it would be irrelevant for this Court to inquire into how or when the federal question was raised since the question was considered and passed upon by the Superior Court of Pennsylvania.

Although the appellant on January 7, 1971, timely filed a Petition for allowance of appeal from the judgment of the Superior Court of Pennsylvania raising the same federal question the Supreme Court of Pennsylvania refused to exercise its discretionary review and denied the Petition in an order dated August 16, 1971, a copy of which is annexed hereto as appendix C.

SUBSTANTIALITY OF FEDERAL QUESTION.

A state penal statute, which in its application deprived appellant of his right to be heard and, in effect, his right to appeal obviously presents a substantial federal question.

The right to be heard is firmly embedded in our due process jurisprudence. *Windsor v. McVeigh*, 93 U. S. 274, 277; *Hovey v. Elliott*, 167 U. S. 409; *Goldberg v. Kelly*, 397 U. S. 254; *Sniadach v. Family Finance Corporation*, 395 U. S. 337.

The right has been refined over the years but no matter how many refinements are added to or subtracted from the basic right, the root requirement still remains that an individual be given an opportunity for a hearing, or a hearing before he is deprived of any significant property interest. See *Boddie v. Connecticut*, 91 S. Ct. 780 (1971); *Armstrong v. Manzo*, 380 U. S. 545, 552.

In the instant case appellant was deprived of approximately one thousand dollars ($1,000.00) before he was permitted to complete his direct testimony and introduce the testimony of two important witnesses. The money of itself constitutes a loss of a significant property interest but in addition appellant, during the period the temporary order was in effect, was subject to imprisonment for contempt, having his wages attached, or his property attached, in the event that he did not make the aforesaid payments. Overall the appellant was compelled to pay over twenty five hundred dollars ($2,500.00) before a final appealable order was entered.

It is true that the appellant was given a partial hearing, that is the opportunity to present part of his direct testimony, but it is submitted that such a hearing is not the kind of hearing afforded within the meaning of the

cases set forth above. The standard set down in the cases seems to be the standard set down in Justice Brennan's concurring opinion in the *Boddie* case, *supra,* wherein he quoted from *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U. S. 886, 895. The quotation therein reads, as follows:

> "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

The precise nature of the government function in the subject case would seem to be the obtaining of a support order on behalf of the wife at the earliest possible time, in order that she might not become a charge of the state, rather than the responsibility of the husband. On the other hand the interest of the individual is not only money (property) but liberty and justice. The appellant is subject to imprisonment, if he fails to pay the order and the principle of justice is clearly in jeopardy, if appellant is denied his property and possible liberty without the right to be heard.

In any tipping of the scales, the result must be in favor of the appellant. The state, at best, has only one interest at stake whereas appellant has at least three interests, two of which are of a higher and more important quality than property.

Appellant's position in connection with his right of appeal being effectively denied him is succinctly stated in 16 Am. Jur. 2d, Constitutional Law § 584 at page 990:

> "A party otherwise entitled to appeal who, by the construction of a statute, is prevented from doing so, where such right is given to all others in similar cases, is thus deprived of the right of due process."

See also 16A C. J. S. Constitutional Law § 626 at page 847 which states:

> "While a statutory review is not a requirement of due process, when such right is created it is important, and must be exercised without discrimination."

Appellant contends that the right of appeal was, in effect, denied to him in this case when he was prevented from appealing the temporary order for over seven and one half months. Only final orders are appealable in the Commonwealth of Pennsylvania. An appeal delayed is tantamount to an appeal denied.

Appellant also contends that he was discriminated against because in most support cases a full hearing is held without delay and a final appealable order is entered by the Court; whereas in appellant's case a final order was not entered for over seven and one half months. It is submitted that such discrimination constitutes a denial of procedural due process.

The questions presented herein are so substantial as to require plenary consideration with briefs on the merits and oral argument because marriage and the incidents thereto, to wit: support are so basic and important to our society that they cannot be ignored. See *Loving v. Virginia*, 388 U. S. 1; *Skinner v. Oklahoma, ex rel. Williamson*, 316 U. S. 535.

Controversies between husbands and wives over support involves literally millions of American citizens. The amount of money involved is literally in the billions. More

importantly the continued existence of an ordered society requires that basic justice and fairness be applied by the Courts in dealing with this type of controversy.

Respectfully submitted,

EDWARD J. O'HALLORAN,
Counsel for Appellant.

APPENDIX A.

IN THE

COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION.

No. 734.

JUNE TERM, 1969.

COMMONWEALTH EX REL. JOAN THOMPSON

v.

JOSEPH R. THOMPSON.

OPINION.

GROSHENS, *P. J.* August 20, 1970. This is an action under The Penal Code, Act of June 21, 1939, P. L. 872, § 733, as amended, 18 P. S. § 4733, brought against the defendant, Joseph R. Thompson, on the relation of his wife, Joan A. Thompson, to compel the payment of support.

The parties were married on June 28, 1969 and experienced marital difficulties shortly thereafter. These difficulties eventually led to separation in July 1969 and culminated in this suit.

The initial hearing in this case was held on November 6, 1969. At the close of that hearing, all of the evidence

not being in, the case was continued to February 4, 1970. In the interim, by a temporary order made effective as of November 1, 1969, we directed the defendant to pay to the relatrix the sum of $80 per week. We noted at that time that if the final order was for a lesser amount—an adjustment would be made (N. T. 110). On February 4, 1970 hearing was resumed in this case and at the close of the hearing we directed that the temporary order of November 1969 remain in effect pending final disposition of the case. On June 23, 1970, after oral argument and consideration of briefs, the temporary order was amended to reduce the amount of the weekly payment to $60 per week. In conformance with our original order we directed that an adjustment be made at the rate of $15 per week, thereby giving the relatrix a payment of $45 per week until the overage paid by the defendant between November 1, 1969 and June 23, 1970 is recouped.

Subsequently, both parties have perfected appeals to the Superior Court thereby necessitating this opinion.

The general legal principles applicable to support cases are well settled. If a wife leaves her husband without adequate legal cause, she forfeits her right to support. If, on the other hand, the wife can establish legal justification, or that the separation was consensual, the husband's liability for support continues. *Commonwealth ex rel. Shapiro v. Shapiro*, 204 Pa. Superior 135 (1964). Mutual consent to a separation and the intention to live apart can be inferred from the conduct of the parties and need not be evidenced by a formal agreement. *Tatem v. Tatem*, 164 Pa. Superior 307 (1949).

It is our conclusion, based upon a thorough review of the testimony and an opportunity to assess the credibility of same, that relatrix left her husband on or about July 15, 1969 and that the separation was consensual. We believe that the defendant's conduct after his wife left, e.g., his

changing the locks on the apartment, demonstrates his consent to her continued absence. There is ample precedent for our decision. In *Duncan v. Duncan,* 171 Pa. Superior 69 (1952), Affd. 373 Pa. 308, it was held that the act of the husband in removing a key from its usual place indicated an unwillingness to have the wife return, and this conduct was deemed an implied consent to her absence. Similarly, in *Gureghian v. Gureghian,* 206 Pa. Superior 411 (1965), the court, citing the *Duncan* case supra, held that what constitutes consent must be determined in each case by examining the conduct of the parties and ascertaining the reasonable effect of their actions.

In this case, the changing of the locks could have but one reasonable effect—preventing the relatrix from returning to the apartment. Our conclusion that the separation was consensual is supported by other conduct of the defendant. Thus, on July 21, 1969 when his wife called seeking to gain access to the apartment, the defendant told her he wanted someone present with him when he let her in (N. T. 168). His conduct at that time typifies defendant's attitude toward his wife's absence.

We are fully aware of *Commonwealth ex rel. Fernandes v. Fernandes,* 202 Pa. Superior 542 (1964), where the court held that a change of locks on the couple's apartment was deserving of no consideration *in the light of overwhelming evidence that the wife was willing to live with the husband and that the husband refused to return* (emphasis ours). We note that in the case at bar the record is wholly devoid of such evidence.

We pass now to the support order itself. The law in this area is quite clear. The function of a trial court in a support case is to fix an amount which is reasonable and proper for the maintenance of the wife—that amount not to exceed one-third of the husband's income when children are not involved. *Commonwealth ex rel. Rankin v. Rankin,* 170

Pa. Superior 570 (1952). The "one-third rule," however, is but a maximum figure and is not to be taken as a measure of what is adequate. *Commonwealth ex rel. Milne v. Milne*, 150 Pa. Superior 606 (1943). Here, where the defendant's net income is approximately $250 per week (N. T. 110), we think $60 per week is a reasonable amount in light of the age, education, and income of the parties and the length of the marriage, etc.

While, in general, a support order can have prospective effect only, this is not an absolute rule. Thus, where the parties are made to understand that the support order will be made retroactive to the date of the original hearing—the retroactivity feature does not invalidate the order. *Commonwealth ex rel. Lipsky v. Lipsky*, 214 Pa. Superior 215 (1969). When we entered our original temporary order we stated that an adjustment would be made if the final order was for a lesser amount (N. T. 110). Our conduct was fully in accord with that approved in the *Lipsky* case supra.

We therefore conclude that the separation in this case was consensual, the defendant's liability for support continued, and that $60 per week was reasonable and proper under the circumstances.

By THE COURT:

DAVID E. GROSHENS,
P. J.

APPENDIX B.

IN THE

SUPERIOR COURT OF PENNSYLVANIA

OCTOBER TERM, 1970.

No. 1197.

COMMONWEALTH OF PENNSYLVANIA
EX REL. JOAN THOMPSON

v.

JOSEPH R. THOMPSON,

Appellant.

APPEALS FROM THE ORDER OF THE COURT OF COMMON PLEAS, CRIMINAL, OF MONTGOMERY COUNTY AT No. 734, JUNE TERM, 1969.

Filed: December 10, 1970.

PER CURIAM

Order affirmed.

APPENDIX C.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT.

No. 494-A MISCELLANEOUS DOCKET No. 18.

OCTOBER TERM, 1970.

No. 1197.

COMMONWEALTH OF PENNSYLVANIA
EX REL. JOAN THOMPSON

v.

JOSEPH R. THOMPSON,
Petitioner.

ORDER ON THE PETITION FOR ALLOWANCE OF APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT.

August 16, 1971. Petition Denied. Per Curiam.

APPENDIX D.

IN THE

COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION.

JUNE TERM, 1969.

No. 734.

COMMONWEALTH EX REL. JOAN THOMPSON,

v.

JOSEPH R. THOMPSON,

Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Filed: September 9, 1971.

Notice is hereby given that Joseph R. Thompson, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Superior Court of the State of Pennsylvania affirming an order for support entered in this action on December 10, 1970.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

/s/ E. J. O'HALLORAN,
Address: 1316 Western Saving Fund Building,
Philadelphia, Pa. 19107
Counsel for Appellant.

APPENDIX E.

§ 733 of the Penal Code provides:

"If any husband, or father, being within the limits of this Commonwealth, separates himself from his wife or from his children, or from wife and children, without reasonable cause, or neglects to maintain his wife or children, (1) his wife or children may file a petition, prepared by the district attorney and joined in and consented to by the husband or father, in the court of quarter sessions of the county in which the wife or children reside or in the county wherein the desertion or failure to maintain took place, setting forth the facts relating to the separation from or neglect to maintain his wife or children, or both, whereupon the court, or any judge thereof in chambers, shall enter an order fixing a time and place for hearing; or (2) any magistrate, upon information made before him under oath or affirmation, by his wife or children, or either of them, or by any person, may issue his warrant for the arrest of the person against whom the information shall have been made, and bind him over, with one sufficient surety, to appear at the court of quarter sessions or other court having jurisdiction, there to answer the said charge of desertion.

The said court, after hearing in a summary proceeding, may order the person against whom complaint has been made or petition filed, being of sufficient ability, to pay such sum as said court shall think reasonable and proper for the comfortable support and maintenance of the said wife or children, or both, including payment for such support and maintenance from the date of the filing of the complaint, which back payment

shall be made at such time or times as the court shall direct, and to commit such person to prison, there to remain until he shall comply with such order, or give security, by one or more sureties, to the Commonwealth, and in such sum as the court shall direct for the compliance therewith. But in no instance shall the defendant be required in any county of the first class to give security for compliance, or be imprisoned for failure to give security for compliance, unless and until the court finds on substantial evidence, (1) that the defendant is possessed of property, real or personal, in sufficient amount and in such form, as to enable him to give the required security, and (2) that the defendant is likely to dissipate his assets or flee the jurisdiction. In each instance in which security for compliance is ordered, the court shall enter upon the record the findings on the basis of which the order is made. The court may also issue the appropriate writ of execution against any property, real or personal, belonging to the defendant, and its writ of attachment execution against any money or property to which he may be in any way entitled, whether under what is known as a spendthrift trust or otherwise, which shall not exceed fifty per centum thereof, and shall remain a continuing levy until the order has been paid in full with costs. The person against whom an order is made shall not be entitled to the benefits of any exemption law now in force or hereafter passed. . . ."

APPENDIX F.

IN THE

COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION.

JUNE TERM, 1969.

No. 734.

COMMONWEALTH EX. REL. JOAN THOMPSON,

v.

JOSEPH R. THOMPSON,

ORDER.

AND NOW, June 23, 1970, after hearings, arguments, and consideration of briefs, the temporary Order of November 1, 1969, as extended by the temporary Order of February 4, 1970, is amended to reduce the weekly support payments from $80.00 to $60.00 per week. Adjustment shall be made at the rate of $15.00 per week, giving the wife a weekly payment of $45.00 until the husband has recouped the overage paid between November 1, 1969 and June 23, 1970.

By THE COURT:

DAVID E. GROSHENS,
P. J.

APPENDIX G.

IN THE

SUPERIOR COURT OF PENNSYLVANIA

OCTOBER TERM, 1970.

No. 1197.

COMMONWEALTH OF PENNSYLVANIA
EX REL. JOAN THOMPSON

v.

JOSEPH R. THOMPSON,
Appellant.

ENTRY OF CERTIFICATION.

Filed: September 16, 1971.

This Court, in addition to the order made herein, orders it to be certified and made a part of the record in this case that the question of whether the Act of June 21, 1939, P. L. 872, §733, as amended, 18 P. S. §4733, which is the basis for the entry of a temporary order, violates the due process clause of the United States Constitution was considered and passed upon by this Court.

By THE COURT:

J. COLVIN, WRIGHT,
P. J.

Attest: CHARLES A. HOENSTINE,
Prothonotary.